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No. 08-701

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In The
Supreme Court of the United States

TIMOTHY ALLEN MORRISON, II, BY AND THROUGH HIS NEXT FRIENDS, TIMOTHY MORRISON AND MARY MORRISON,

Petitioners,

v.

BOARD OF EDUCATION OF BOYD COUNTY, KENTUCKY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly determined that Petitioner lacked standing and could not pursue a claim for even nominal damages.

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The Petitioner's claims were initially considered by the United States District Court, Eastern District of Kentucky, by the same Judge who had been involved in the earlier Equal Access Act proceedings arising out of the formation of the Gay-Straight Alliance at the High School. Judge Bunning was therefore quite familiar with the background of the proceedings. *Morrison v. Board of Education of Boyd County, Kentucky*, 419 F.Supp.2d 937, 939 (E.D. Ky. 2006). Significantly, Judge Bunning found that the student training (diversity training videos) was speech by the school, which was viewpoint neutral. The Court further found that the restrictions on speech expressed in the training materials were "in line with *Tinker* . . . ". *Id.*, pp. 942-943 [citing *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)].

The District Court properly analyzed the issues under the three categories of speech in the school context: government speech, school-sponsored speech, and student speech, with the corresponding degree of First Amendment protection. *Id.*, p. 941. The Court held "that the purpose of the training, to-wit, to address the issue of harassment at school, including harassment based on actual or perceived sexual orientation, is rationally related to a legitimate educational goal, mainly to maintain a safe environment . . . there is no burden on Plaintiffs' freedom of speech, free exercise, or other Constitutional right . . . ". *Id.*, p. 946.

The District Court did not ignore or overlook the Petitioner's claim for nominal damages. Rather, the

Court held "the only possible basis the Court can discern for any award of damages to Plaintiff is the limited period of time during which the Board's written policies were constitutionally suspect. Yet, again, Plaintiffs have made no specific plea." *Id.*

The District Court never held, however, that any of the materials at issue were unconstitutional. Indeed, the Respondent has consistently asserted that the single paragraph complained of in the High School Code of Conduct is ***not*** unconstitutional in light of the history of problems in the Boyd County School District. The Respondent has always maintained that the Board Policies, School Code of Conduct, and training materials were all consistent with *Tinker* and the holding of the Tenth Circuit in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000).[1]

The first Opinion of the United States Court of Appeals for the Sixth Circuit, *Morrison v. Board of Education of Boyd County*, 507 F.3d 494 (6th Cir.

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[1] In *West*, language very similar to the language in the Code objected to by Petitioner herein was upheld; one reason was that there had been an undisputed history of disruption of the nature sought to be remedied. *West*, pp. 1365-1366. See also *Tinker*, 393 U.S. 509, *Sypniewski v. Warren Hills Board of Education*, 307 F.3d 243, 261-262 (3rd Cir. 2002), and *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001). With due respect to both the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit, the Respondent herein is rather frustrated by the lack of a due determination in this regard.

2007) determined, in a two (2) to one (1) opinion, that the case should be remanded to determine whether the Petitioner could show that the Respondent's actions or policies "would deter a person of ordinary firmness from exercising his or her First Amendment liberties in the way that the Plaintiff alleges he or she would have, were it not for the Defendant's conduct or policy. Consequently, we **REVERSE** the district court's grant of summary judgment to the Board, but only insofar as it pertains to Morrison's free-speech claim seeking nominal damages." *Id.*, pp. 506-507.

Significantly, the Sixth Circuit did find that the definition of harassment found in the Boyd County High School Code of Conduct "tacks quite closely to the *Tinker* standard." *Id.*, p. 505. The first Sixth Circuit Opinion, however, nevertheless reversed and remanded on the single issue. *Id.*[2]

Judge Cook dissented in the initial Sixth Circuit Opinion, making the following points:

> 1. "The majority burdens a federal district judge with a full-blown trial to determine whether to award the plaintiff a single dollar if a policy no longer in effect was unconstitutional despite never being enforced against the plaintiff." *Id.*, p. 507.
>
> 2. The named Defendant in the litigation was the School District, not the High School

[2] The Sixth Circuit failed to note, however, that the Petitioner did not even watch the training video.

Code of Conduct, the High School, or a particular administrator. *Id.*

3. The facial challenge to the prior Code of Conduct had already been "won" as the provision had been changed. *Id.*[3]

4. The school district's policy (the school district being the actual defendant) included a provision that the policy would "not be interpreted as applying to speech otherwise protected under the state or federal Constitutions where the speech does not otherwise materially or substantially disrupt the educational process." Judge Cook noted she saw "no evidence in the record that the school district would have punished him for protected speech in violation of its own policy." *Id.*

5. Judge Cook did not see how nominal damages would redress an injury of "past chill." "Nominal damages based on a regime no longer in existence has *no* effect on the parties' legal rights." *Id.*

6. "The School District has, at the behest of the Plaintiffs and the Intervenors, adopted a policy that properly balances the District's

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[3] The Respondent does disagree with the dissenting Judge's characterization that Respondent was "forced . . . under Court supervision to change its policy" as the Respondent attempted persistently to identify what the specific and detailed First Amendment concerns were long before litigation was even instituted in the hopes of avoiding litigation.

> duty to protect openly gay and lesbian students with the important First Amendment right of allowing students to speak their minds. Keeping this case alive for determination on the constitutionality of an obsolete code of conduct in the hope of awarding the plaintiff a single dollar vindicates no interest and trivializes the important business of the federal courts in protecting actual constitutional violations." *Id.*, pp. 507-508.

The Respondent sought rehearing *en banc*. In the interim, the United States Court of Appeals for the Sixth Circuit vacated its prior Opinion, and, in a new Opinion, Judge Cook's views now represent the majority. *Morrison v. Board of Education of Boyd County*, 521 F.3d 602 (6th Cir. 2008). The Sixth Circuit ultimately determined that Petitioner did not demonstrate an injury in fact so as to have standing. The Court relied upon precedent both from the United States Supreme Court and the Sixth Circuit to analyze the standing requirement that "a litigant demonstrate either a concrete harm or the threat of such harm." *Id.*, p. 608, citing *Laird v. Tatum*, 408 U.S. 1 (1972); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 660 (6th Cir. 2007); *Warth v. Seldin*, 422 U.S. 490 (1975).

The Court did review a number of cases, including cases from other Circuits, involving concrete acts such as issuance of a temporary restraining order, an eight month investigation, and alleged seizures of documents. *Id.*, p. 609. The Court likewise reviewed precedent from the Sixth Circuit, the District of Columbia Circuit, and the United States Supreme

Court, on the point that "absent proof of a concrete harm, where a First Amendment Plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists." *Id.*, pp. 609-610. Citing *ACLU, supra*, 493 F.3d at 662, the new Opinion notes that "Morrison cannot point to anything beyond his own 'subjective apprehension and a personal (self-imposed) unwillingness to communicate.' . . . and those allegations of chill, without more, fail to substantiate an injury-in-fact for standing purposes." *Id.*, p. 610.

The final Opinion of the Sixth Circuit is premised on the determination of no injury in fact, and thus no standing. The Sixth Circuit's comment on nominal damages simply flows from its determination on standing. The panel held "while we may have allowed a nominal-damages claim to go forward in an otherwise moot case, see *Lynch v. Leis*, 382 F.3d 642, 646 n.2 (6th Cir. 2004); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981), we are not required to relax the basic standing requirement that the relief sought must redress an actual injury." *Id.*, p. 611.

Judge Moore, who wrote the majority Opinion in the first Sixth Circuit panel Opinion, dissented in this final Opinion.

In the Respondent's Petition for Rehearing *En Banc*, which seemed to precipitate the revised Opinion, the Respondent pointed out the consistency of the Code of Conduct provision with the decision in *West v.*

Derby Unified School District, supra, at footnote 3, especially in light of the history of disruption in this School District as considered under *Castorina v. Madison County School Board, supra*.

The Respondent also explained that to find a chilling effect from that Code of Conduct provision, the Court would have to find that a person of ordinary firmness would have been deterred from speech based upon a single paragraph on a single page of the High School Code of Conduct, which person of ordinary firmness would have had to have ignored the definition of harassment contained in that same Code of Conduct, as well as ignoring the detailed discussion of specific rights to all parties in an harassment investigation, as well as failing to read and consider the actual Board Policy on harassment and discrimination. The Respondent pointed out that for the Petitioner to be successful on remand, he would have to establish that he read only one paragraph on one page in the entire Code of Conduct while ignoring several proceeding pages, ignoring the reporting form on harassment and discrimination, ignoring the readily available resources of Compliance Coordinators, ignoring the definitions set forth in the very same Code of Conduct, and ignoring Board Policy, and yet be found to be "a person of ordinary firmness." The Respondent argued that any student's perception that he or she would be punished merely for expressing the belief that homosexuality was a sin was patently unreasonable considering the totality of the facts and circumstances.

With respect to the training video, the Respondent noted it would be likewise fantastic for the Petitioner to demonstrate that he was chilled by anything in the training video since he did not watch the training video. It would also be unlikely that the Petitioner could establish that a person of ordinary firmness would be chilled by the training video given the overriding statements contained therein which are clearly consistent with the *Tinker* standard for student speech, and, with respect to the school speech on student behavior, consistent with First Amendment jurisprudence governing school speech. See Petition for Rehearing *En Banc*, submitted on behalf of Defendant-Appellee Board of Education of Boyd County, Kentucky, Respondent herein.

Only after the Sixth Circuit vacated the initial Opinion and issued the new panel Opinion did the Petitioner herein, and the Intervenors below, seek rehearing. This is significant, because it is a concession that the only remaining issue was whether the paragraph from the High School Code of Conduct and portion of the training videos would have deterred a person of ordinary firmness from exercising First Amendment rights. The Petitioner did not otherwise challenge the findings and holdings below.

COUNTERSTATEMENT OF THE CASE

A. Policies and Codes

At the outset, a distinction must be made between the actual policies of the Respondent from a school code of conduct. Petitioner was a Boyd County High School student. Petitioner's "policy" claims actually concern only one paragraph of a Code of Conduct enacted by a non-party, the Boyd County High School Site-Based Council. The actual policies of the Respondent herein, the Board of Education of Boyd County, Kentucky, have never been claimed to violate the First Amendment to the United States Constitution.

At all relevant times, the Respondent's policy on Harassment and Discrimination, 09.42811, included the following limitation: "The provisions in this policy shall not be interpreted as applying to speech otherwise protected under the state or federal constitutions when the speech does not otherwise materially or substantially disrupt the educational process, as defined by Policy 09.426, or where it does not violate provisions of Policy 09.422." (Apx. p. 255).

The definition of harassment/discrimination set forth under that Board policy is as follows:

> Harassment/Discrimination is unlawful behavior based on race, color, national origin, age, religion, sex actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a

> student's education or creates a hostile or abusive educational environment.

Id.

Board Policy number 09.426, as referenced in the policy on harassment and discrimination, prohibits behavior that materially or substantially disrupts the educational process. Board Policy 09.422 prohibits hazing, bullying, menacing, taunting, verbal or physical abuse of others, or other threatening behavior, which is disruptive of the educational process and interferes with the ability of other students to take advantage of the educational opportunities offered. Thus, in all three relevant Board policies, the prohibited speech is clearly and unambiguously limited to speech which is materially or substantially disruptive of the educational process.[4]

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[4] Boyd County School District, like all school districts in Kentucky, has codes of conduct promulgated in accordance with applicable state law. E.g., KRS 158.148, KRS 158.150. Individual schools are governed by site-based councils, which also have authority to determine specific discipline. KRS 160.345. The Boyd County School District Board policies, including those of record herein, are based upon a policy subscription service provided by the Kentucky School Board Association. The Kentucky School Board Association provides references to both state and federal law. For example, Policy number 09.422 cites both *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *inter alia*. The harassment/discrimination policy does not specifically cite *Tinker*, but, references Policy number 09.422, and specifically includes the same language, i.e., that the policy provisions do not apply to protected speech which does not

(Continued on following page)

The Boyd County High School Code of Conduct similarly defined harassment at the relevant time as follows:

> **Definition of Harassment: Harassment/ discrimination is unlawful behavior based on race, color, national origin, age, religion, sexual actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment.** (Bold in original).

The High School Code also set forth the specific rights of all parties to the investigation, including the due process rights of the alleged perpetrator. The right of appeal to the Board of Education was stated. In addition to explaining virtually every step in the investigatory process, the High School Code of Conduct further notified students that if they were not satisfied with the District's response, students could file a complaint with the Office of Civil Rights, and provided the address. (Apx. pp. 271-273). A form for reporting harassment/discrimination by students explicitly references Board Policy number 09.4281. (Apx. p. 266).

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otherwise materially or substantially disrupt the educational process.

The Petitioner bases one of his claims of a First Amendment violation solely on a single paragraph found on page sixteen of the High School Code, which stated at the time as follows:[5]

> **HARASSMENT/HATE CRIMES (Refer to Harassment Section)**
>
> *(Note: bold in original)*
>
> Harassment/discrimination is intimidation by threats of or actual physical violence; the creation by whatever means, of a climate of hostility or intimidation, or the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect of insulting or stigmatizing an individual.

(Apx. p. 266).

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[5] The Respondent was not "forced" to change this Code of Conduct or other materials, but agreed to do so during the pendency of the litigation. *Morrison v. Board of Education of Boyd County, Kentucky*, 419 F.Supp.2d 937, 940 (E.D. Ky. 2006); cp/cf., *Morrison v. Board of Education of Boyd County*, 507 F.3d 494, 507, Judge Cook dissenting (6th Cir. 2007). In fact, the Board's Policies and School Codes of Conduct, as well as the "diversity training" videos, were all readily available long in advance of the Petitioner's institution of litigation, and neither the Petitioner herein nor the Intervenors below ever made any specific pre-litigation complaint about particular provisions of the materials, despite repeated invitations by the Respondent to do so. The Respondent was not given details of the Petitioner's objections until litigation was well under way, and the Respondent then acted voluntarily and promptly to resolve the concerns of the other parties thereafter.

B. Student Training Videos

The Boyd County School District, in conjunction with the Anti-Defamation League, prepared two videotapes (one for the High School and one for the Middle School) to implement the student training agreed to resolve the prior litigation [Equal Access Act claim arising from formation of a Gay-Straight Alliance and the Boyd County High School with resulting disruption; see *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, Kentucky*, 258 F.Supp.2d 667 (E.D. Ky. 2003)]. After watching the video, students were asked to comment on the training. The students expressed whatever they wished, and were not punished for those expressions. *Morrison*, *supra*, 419 F.Supp.2d 942-943. The Petitioner, however, did not watch the video. *Id.*, p. 943.

The videos began with this statement: "Harassment/discrimination is unlawful behavior based on race, color, national origin, age, religion, actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment. So basically what we're saying here is harassment constitutes an action that will take away a student's right to an education . . . if you are unsure whether something constitutes harassment, feel free to go and talk to your school administrator, your principal, assistant principal, even your teachers and they will help you to understand exactly

what this means if you are unsure." (Apx. p. 224, p. 231).

The videotaped training did include the following statements of an independent (non-school employee) psychologist:

> But here is the kicker, just because you believe, just because you don't like them, just because you disagree with them, just because you believe they are wrong, whole heartedly, absolutely, they are wrong. Just because you believe that does not give you permission to say anything about them. It doesn't require that you do anything. You just respect, you just exist, you continue, you leave it alone. There is not permission for you to point it out to them. They probably know that you disagree. Most people know that not everybody believes what they believe. Most people know that not everybody is like them. All of us know that on some levels, not everybody likes us. We all know that. It's not something that we need to have pointed out to us. And its not something that you are required to point out to other people.

The above segment is only a small part of the psychologist's overall statements, and a smaller part of the overall training materials. The psychologist's segment concluded in this manner:

> So again, to emphasize the points, the goal of this video is to help educate you about that you can't avoid that there are differences. You can't avoid that you believe other people

> are wrong. You can't avoid that here is a set of people, here is a set of people, here is a set of people, a lot of sets of people, a lot of different ways. The point is harassment and discrimination based upon sexual orientation, real or perceived, and gender identity, real or perceived, will not be tolerated by your school system.

(Apx. pp. 195-196; p. 230).

The training videos ended overall with these words from the High School Compliance Coordinator Matthew Spade:

> In today's video you learned about bullying, you learned about name calling and we hope you learned a little bit about how to treat people with respect, ***and with that respect also comes the school's respect for your beliefs, your religious beliefs and your sense of right and wrong. We would never try to influence those things. They are very sacred and they should only be influenced by you and your parents and family***. Please realize that with the video that we showed today we are only trying to instill a sense of honor amongst our students to learn not to treat someone unfairly or harass someone because they are different from us. If you have any questions about the video that you just saw there will be a short question and answer session at the conclusion of this video. If you do not feel comfortable asking these questions in front of your classmates, feel free to contact the counselors

> through the school email system. We would hope that you would also discuss these issues with your family at home. Thank you. (Emphasis added).

See *Morrison*, 419 F.Supp.2d at 944-945; (Apx. p. 200; p. 234).

Nowhere in the video training was it stated that "homosexuality is a characteristic that cannot be changed . . . ". Nowhere in the video is it stated that "it is wrong to communicate one's objection to the homosexual lifestyle to someone who is homosexual." The Petitioner's claim that students were instructed that the district policy prohibited students from communicating to a homosexual the belief that the homosexual lifestyle was wrong is not in fact supported in the record.

The Petitioner persists in mischaracterizing the Respondent's Answer to the Petitioner's shotgun-style Complaint which instituted the litigation. The Respondent simply stated in its Answer that allegations of the Petitioner were admitted "only to the extent actually consistent with" the materials at issue, and the Respondent denied all allegations inconsistent with the actual materials at issue. This type of Answer was necessitated by the Petitioner's failure to give notice of exactly which Policy provisions, Code provisions, or portions of the lengthy script from the training materials were alleged to so state.

In fact, students were allowed to express their views about the training, about homosexuality, and

about the Gay-Straight Alliance without punishment provided school was not disrupted. *Morrison, supra*, 419 F.Supp.2d at 943. Indeed, the District Court specifically found as follows:

> The opportunity to speak with regard to the training, without parameters, and with no threat of punishment, belies Plaintiffs cry of chilling effect. Had the student-Plaintiff attended the training, he would have been given the chance to express his views. Indeed, one such comment card read: "I agree with the fact that no one should be harassed, but I am a Christian. I am a firm believer in Romans where it says that unnatural attraction is wrong. I would never harass a homosexual student. Although I do not approve at all of what they do. Homosexuality is a sin and that is my belief, but it is wrong to harass or bully anyone." The only restrictions on speech expressed in the training materials pertain to potential student speech and are in line with *Tinker* [*Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)] in that harassing speech which disrupts the educational process will not be tolerated.

Id. As noted by the District Court, Petitioner Timothy Morrison, II did not even attend a viewing of the video training.

REASONS FOR DENYING THE PETITION

I. The determination that Petitioner lacked standing is entirely correct and does not conflict with any other applicable precedent

The contention that the present Sixth Circuit Opinion conflicts with other decisions is simply not borne out by the applicable facts and law. In the cases relied upon by Morrison, there was either a concrete adverse action taken under an objectionable statute or policy, or a realistic fear that some adverse action would be taken, and/or a reasonable concern that the objectionable conduct would recur.

For example, in *Steffel v. Thompson*, 415 U.S. 452 (1974), arrest was actually threatened, and a companion was in fact arrested. The Petitioner does not purport that the decision in *Steffel* conflicts with the United States Supreme Court decision in *Laird v. Tatum*, 401 U.S. 1 (1972). Here, as in *Laird*, the Sixth Circuit properly determined that the Plaintiff's claim "resulted from a confluence of subjective perceptions, beliefs, and apprehensions (*Laird* at 13) . . . ", insufficient to allege an injury in fact for standing. *Morrison*, 521 F.3d at 610.

The United States Supreme Court has long held that standing requires something more concrete. As noted by the Sixth Circuit in the present Opinion, the United States Supreme Court has stated "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a

threat of specific future harm." *Morrison*, 521 F.3d at 608, citing *Laird*, *supra*, at 13-14 (other citations omitted). The difference between *Laird* and *Steffel*, is that in the latter, "the threat of arrest was not 'imaginary or speculative' . . . ". Petitioner's Petition for Writ of Certiorari, p. 19, citing *Steffel* at p. 459. Requiring a concrete act is thus not at all inconsistent with *Steffel*, nor is *Steffel* inconsistent with *Laird* or the instant decision. Rather, as the Petitioner has admitted, in *Steffel* there was a concrete threat of arrest which was objectively reasonable.

The First Circuit decision in *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F.3d 26 (1st Cir. 1999), involved a clear, unambiguous prohibition which would arguably apply to proposed conduct. Significantly, the First Circuit noted that the determination of "objective reasonableness demands a frank consideration of the totality of the circumstances, including the nature of the conduct that a particular statute proscribes." *Whitehouse* at 31. Applying the reasoning of the First Circuit to the facts in this case, there is absolutely no conflict. Here, under the totality of circumstances, the Petitioner's claimed chill is not only unreasonable but frankly incredible.

The Second Circuit decision in *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) is factually inapposite. There, although the defendant stated that it did not interpret the statute as prohibiting the proposed conduct, nevertheless, the Court was concerned that the defendant might

change its mind.[6] The key to understanding *Sorrell*, however, is that the Court concluded that the plaintiff's interpretation was reasonable. As above, no such conclusion could be reasonable with respect to the Petitioner's claimed fear in this case.

Similarly, the other Second Circuit decision cited by Petitioner, *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2nd Cir. 2003) is best understood as a determination that the plaintiff had a reasonable fear that its activity would be proscribed. Again, the facts in this case are simply not analogous with the facts in the Second Circuit case as relied upon by Petitioner.

The Eleventh Circuit decision relied upon by Petitioner, *Pittman v. Cole*, 267 F.3d 1269 (11th Cir. 2001) also presented a reasonable belief that judicial candidates might be punished for expression, even though the opinion of the Judicial Inquiry Commission was merely advisory. There, the advisory opinion unequivocally stated that the conduct at issue violated certain provisions of the canons of judicial ethics. Given that the Judicial Inquiry Commission which issued the advisory opinion also has the authority to enforce those canons against Alabama

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[6] This raises the second aspect of the Opinion at issue, namely, whether there is any standing when there is nothing left to redress because the objectionable provision has been changed and the change is unlikely to be rescinded.

judges, obviously the threat in that situation was concrete and objectively reasonable.

Similarly, in cases otherwise cited below by Judge Moore and Petitioner, the harm was concrete or the threat of harm was concrete. E.g., *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) [lengthy investigation by governmental agency in apparent retaliation for protected expression]; *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988) [threat of criminal prosecution was realistic, however, Legal Aid Society suffered no injury, and lacked standing]; *Husain v. Springer*, 494 F.3d 108 (2nd Cir. 2007) [student election was nullified by college president in response to student newspaper article]; *Murray v. Bd. of Trustees, Univ. of Louisville*, 659 F.2d 77 (6th Cir. 1981) [editor of school newspaper was fired].

The facts of this case, however, amply demonstrate that Morrison's claim of chill was merely subjective and not based on any reasonable fear; that a person of reasonable firmness would not have been deterred by the policies and procedures in effect from protected speech. The Boyd County School District has voluntarily changed the suspect portions of the Code of Conduct (which appear to have been appropriate pursuant to *West, supra*, in any event) and the videos; there is no reasonable likelihood that the Respondent would permit the schools to return to the former version; that the Petitioner's claim is nothing more than an unsubstantiated and subjective perception insufficient to constitute standing even for

nominal damages. *Laird v. Tatum*, 408 U.S. 1, 10, 13 (1972); *City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 660 (6th Cir. 2007) [the Court noted that the claimed difficulty in determining whether a government policy or practice applies to the plaintiff's proposed conduct does not by itself support standing]; *Lynch v. Leis*, 382 F.3d 642, 647-648 (6th Cir. 2004).

In sum, not only did the Sixth Circuit correctly hold that the Petitioner failed to demonstrate an injury in fact for standing, further, it is respectfully submitted that there is simply no evidence of a constitutional violation in the first place. The materials which the Petitioner objected to would not have, in any event, violated the Petitioner's rights under the First Amendment, as those materials were consistent with established precedent and appropriate under the totality of the facts and circumstances. E.g., *West, supra.*

II. Nominal damages were properly denied

First and foremost, nominal damages were properly denied because, as stated above, the Code of Conduct provision at issue was never unconstitutional. The Petitioner did not even watch the videotaped student training. The Petitioner could not have been a person of ordinary firmness whose speech was chilled in light of the overall context of the School District's student speech policies and materials. The Petitioner did not and could not establish standing.

Second, even if the Petitioner had overcome these hurdles, nevertheless, an award of nominal damages against the Respondent would not have been permissible under these circumstances.

Article III of the Constitution only permits the federal courts to adjudicate actual cases or controversies; a litigant must show that he has suffered or is threatened with an actual injury traceable to the defendant which is likely to be redressed by a favorable decision. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). As the District Court noted, because the Respondent changed the provisions objected to by Petitioner and Intervenors below, any issue over past provisions was moot.

While there are exceptions to the doctrine prohibiting adjudication of moot issues, none of those exceptions apply in this case. To survive dismissal for mootness, the Petitioner would have to show that some secondary or collateral injuries survive, or that the issue is capable of repetition yet evading review, or that, although the Defendant has voluntarily ceased the allegedly illegal practice, there is a reasonable expectation that the alleged illegal practice would resume in the future. E.g., *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2662 (2007). In this case, given the School District's willingness to change specific portions of the Code of Conduct and video training segments, the overall consistency of the District's student's speech policies with the *Tinker* standard, and the lack of any evidence whatsoever that the Respondent ever

permitted an inappropriate interpretation or implementation of the student speech codes and policies, none of the exceptions to the mootness doctrine apply.

Petitioner, however, insists that his claim for nominal damages salvages the case from mootness and requires the District Court to adjudicate the issue. Courts have noted, however, a concern with nominal damages claims being made simply to avoid the otherwise proper dismissal of moot cases, evading the usual prohibition on rendering advisory opinions. E.g., *Arizonans For Official English v. Arizona*, 520 U.S. 43, 71-73 (1997).

The Petitioner ignores the principle that damages, even nominal damages, must still be premised upon a determination of unlawful conduct. E.g., *Carey v. Piphus*, 435 U.S. 247 (1978). In the absence of a constitutional deprivation, a claim for nominal damages obviously does not salvage the litigation from mootness. *Tanner Advertising Group, LLC v. Fayette County*, 451 F.3d 777, 786-787 (11th Cir. 2006). The Petitioner still fails to show that any relief could redress a cognizable Article III injury. Cp./cf., *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83 (1998).

There is a further reason that nominal damages could not be awarded against the Respondent in any event, namely, that the Respondent is entitled to

immunity.[7] Under state law, there is no question that local Boards of Education are agencies of the state. *Clevenger v. Board of Education of Pike County*, 799 S.W.2d 5 (Ky. 1990); *Yanero v. Davis*, 65 S.W.3d 510, 526-527 (Ky. 2001). As such, a Board of Education such as Respondent is entitled to governmental immunity. *Yanero, supra.*

Unfortunately, the law in federal courts in Kentucky on Eleventh Amendment immunity has been confused for many years due to a misunderstanding of the relationship between federal law and state law. The federal courts in Kentucky have routinely held that Kentucky school districts are not entitled to immunity under the Eleventh Amendment. E.g., *Blackburn v. Boyd County Board of Education*, 749 F.Supp. 159 (E.D. Ky. 1990). This misunderstanding appears to stem from cases involving local entities not actually considered state agencies under their applicable state law. E.g., *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Howlett v. Rose*, 496 U.S. 356 (1990). However, when, under state law, it is clear that a school district is a state agency, then, it should also be deemed a state agency for purposes of Eleventh Amendment immunity. *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992). The Sixth Circuit has

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[7] The Respondent has consistently so maintained. See Answer, Apx. 36-37.

also indicated that immunity may be a proper consideration in a claim for nominal damages. *Murray, supra* at 79. Accordingly, the Respondent would in any event be immune from *any* damages.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

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